

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

ROBERT MICHAEL SKLAR

A Member of the State Bar

Nos. 87-O-13044, 91-P-07863

Filed December 10, 1993; as modified, February 7, 1994

SUMMARY

Respondent was found culpable of six counts of misconduct, involving misappropriation of trust funds in three personal injury cases, failure to advise clients in three cases of potential conflicts of interest, an improper loan to one client, failure to return files in three cases, failure to perform services in one case and failure to communicate with a client in another matter. Respondent also violated the reporting requirements of his previously imposed disciplinary probation. The hearing judge concluded that the misconduct was aggravated by bad faith and dishonesty and caused harm to clients, the public, and the administration of justice, and that no mitigating evidence was presented. Respondent admittedly suffered from cocaine addiction for which he was then in a court-ordered treatment program. The hearing judge recommended a four-year stayed suspension on conditions including actual suspension for two years and until respondent demonstrated his rehabilitation and fitness to practice. (George C. Wetzel, Judge Pro Tempore.)

Both parties sought review. The State Bar Office of Trials contended that respondent should be disbarred, based on his misappropriation of over \$13,800 and his prior record of discipline, which the Office of Trials argued should have been given greater weight. Respondent contended that the misappropriation was negligent rather than intentional, that he was not culpable of the conflict of interest charges because the applicable rule did not cover potential conflicts, and that his loan to his client was a proper advance of litigation costs. He also argued that mitigating evidence should have been considered and that his prior misconduct should not have been considered aggravating because it was contemporaneous with the misconduct in this matter. He urged that the discipline include only one year of actual suspension.

The review department concluded that respondent did violate the conflict of interest rule by failing to advise three sets of clients of potential conflicts of interest, and that his loan to a client was improper, but that these violations were minor. However, the review department recommended respondent's disbarment based on his dishonest misappropriation of over \$13,800 in trust funds over several years, the additional misappropriation of which he had been found culpable in the prior matter, his ongoing substance abuse problem, and his failure to comply with the terms of his probation.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Nancy J. Watson

For Respondent: David A. Clare

HEADNOTES

- [1 a, b] 101 Procedure—Jurisdiction
139 Procedure—Miscellaneous
191 Effect/Relationship of Other Proceedings
1549 Conviction Matters—Interim Suspension—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding

Finality of an attorney's criminal conviction is not essential for an order referring the conviction to the State Bar Court Hearing Department for a determination whether there is probable cause to conclude that the circumstances of the conviction involved moral turpitude for purposes of interim suspension of the attorney.

- [2] 101 Procedure—Jurisdiction
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

The possibility that criminal proceedings against an attorney may be dismissed if the attorney complies with the terms of criminal probation is not relevant to the effect of the conviction in disciplinary proceedings.

- [3] 159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

A conviction after a plea of nolo contendere is a conviction for disciplinary purposes no less than a conviction after a plea or verdict of guilty.

- [4] 220.10 State Bar Act—Section 6103, clause 2
221.00 State Bar Act—Section 6106

Unlike the statute regarding violations of an attorney's oath and duties, which has been construed only to state a sanction and not to proscribe conduct, the statute regarding conduct by attorneys which involves moral turpitude, corruption or dishonesty has been construed so as to permit violations thereof to be charged and proved.

- [5 a, b] 106.20 Procedure—Pleadings—Notice of Charges
192 Due Process/Procedural Rights
273.30 Rule 3-310 [former 4-101 & 5-102]

A notice to show cause in a disciplinary proceeding meets the requirements of due process when it specifies the conduct at issue and the rule charged. Where a notice to show cause named the clients involved in each count, identified them as driver and passenger, averred that respondent agreed to represent each in a personal injury case without advising them of their potential conflict and obtaining their written consent, and cited the rule regarding representation of adverse interests, respondent was given adequate notice of the charge against him. Given the specificity of the factual allegations, adequate notice was given even in a count which did not specify the subsection of the rule being charged.

[6 a-d] 204.90 Culpability—General Substantive Issues**273.30 Rule 3-310 [former 4-101 & 5-102]**

Although the former rule of professional conduct governing representation of clients with conflicting interests did not expressly state that it encompassed potential as well as actual conflicts of interest, once the rule had been interpreted in case law to make it clear that potential conflicts between clients required written consent for a single attorney to represent them in civil litigation, and in light of the prophylactic intent of the rule, an attorney had a duty to obtain the clients' informed consent before agreeing to represent both driver and passenger in an automobile accident case where there was no bar to a claim by the passenger against the driver.

[7 a, b] 162.19 Proof—State Bar's Burden—Other/General**169 Standard of Proof or Review—Miscellaneous****204.90 Culpability—General Substantive Issues****273.30 Rule 3-310 [former 4-101 & 5-102]**

In a disciplinary proceeding, a culpability determination must not be debatable. Accordingly, where the applicable rule of professional conduct did not expressly require written consent to joint representation of clients with potentially conflicting interests, the issue for the court was whether the case law at the time of an attorney's alleged violation of the rule made it clear that such consent was required in civil litigation.

[8 a, b] 273.30 Rule 3-310 [former 4-101 & 5-102]**720.10 Mitigation—Lack of Harm—Found**

By failing to disclose to clients the potential conflict between driver and passenger in an automobile accident case, and to secure their written consent to joint representation, an attorney exposes the clients to sharing confidences without realizing the potential impact of doing so; to possible delay if the attorney is later disqualified due to the development of an actual conflict; and to reduction of the passenger's recovery through failure to allege the driver's negligence. However, where it was not clear that respondent's clients would not have given their informed consent if they had been afforded the opportunity to do so, respondent's violation of the rule requiring him to obtain such consent was not serious.

[9 a-c] 273.00 Rule 3-300 [former 5-101]**291.00 Rule 4-210 [former 5-104]****720.10 Mitigation—Lack of Harm—Found**

Advancing expenses to clients is not a generally accepted practice because it may cause clients to choose attorneys on the basis of the loans they are willing to make rather than the services they offer and may also create an attorney-client conflict. The rule permitting attorneys to advance client expenses is limited to expenses related to litigation or legal services. Where, after respondent was retained by a client in a personal injury action, he made an interest-free, unsecured loan to the client to cover funeral costs and other expenses, such advance was not permitted by the rule even though the expenses might be recoverable as damages in the litigation. The loan was also improper because respondent did not obtain the client's informed written consent. However, where there was no evidence of client harm, the violation was not serious.

[10] 221.00 State Bar Act—Section 6106**280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where, after receiving medical payments advanced by his personal injury client's first-party insurer, respondent misappropriated the funds; failed to apprise his client that the first-party insurer was subrogated to the client's recovery against the other driver; failed to ensure that the first-party

insurer was reimbursed from the ultimate settlement; failed to deduct the subrogation amount from the settlement in calculating his fee, and failed to refund the resulting excess fee for three years after the client demanded the refund, respondent violated the statute prohibiting moral turpitude and dishonesty and the rule regarding prompt payment of client funds on demand.

- [11 a, b] **162.19 Proof—State Bar’s Burden—Other/General**
- 162.20 Proof—Respondent’s Burden**
- 164 Proof of Intent**
- 204.90 Culpability—General Substantive Issues**
- 420.00 Misappropriation**
- 541 Aggravation—Bad Faith, Dishonesty—Found**
- 802.69 Standards—Appropriate Sanction—Generally**
- 822.10 Standards—Misappropriation—Disbarment**

Once a trust account balance has fallen below the appropriate amount, an inference of misappropriation may be drawn, and the burden shifts to the attorney to show that misappropriation did not occur. Where there were numerous instances over several years in which funds were depleted or nearly depleted from respondent’s trust account; respondent delayed in making repayment until the client complained to the State Bar or was sued, and respondent’s explanations lacked credibility, the evidence supported the conclusion that respondent’s repeated acts of misappropriation were due to dishonesty rather than negligence. The distinction between negligent and dishonest misappropriation can be very significant in determining appropriate discipline.

- [12 a-c] **513.10 Aggravation—Prior Record—Found but Discounted**

Prior discipline is always a proper factor in aggravation. However, because part of the rationale for considering it is that it is indicative of a recidivist attorney’s inability to conform to ethical norms, the aggravating force of prior discipline is diminished if the misconduct occurred during the same period as the misconduct in the prior matter. In this circumstance, it is appropriate to consider what the discipline would have been if all the charged misconduct during the time period had been brought as one case.

- [13 a-c] **420.00 Misappropriation**
- 521 Aggravation—Multiple Acts—Found**
- 582.10 Aggravation—Harm to Client—Found**
- 691 Aggravation—Other—Found**
- 805.10 Standards—Effect of Prior Discipline**
- 822.10 Standards—Misappropriation—Disbarment**
- 1093 Substantive Issues re Discipline—Inadequacy**

Where an attorney has previously been disciplined for misappropriation, the attorney is eligible for disbarment if found culpable of misappropriation in a second matter. Where respondent’s total misconduct in two separate disciplinary cases involved ten client matters, spanned all but three years of his practice, and harmed or jeopardized numerous clients, and respondent had an ongoing substance abuse problem and had not complied with his probation in the first matter, his aggregate misconduct clearly required imposition of the harshest discipline, and there was no basis for a recommendation of suspension rather than disbarment.

- [14] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
- 795 Mitigation—Other—Declined to Find**
- 1719 Probation Cases—Miscellaneous**

Respondent’s partial restitution and attempts to obtain an accountant in order to file his quarterly probation reports were not entitled to any mitigating weight, because he did not complete

restitution until the eve of his disciplinary hearing, and failed to notify his probation monitor of his difficulty in complying with the disciplinary order requiring him to have an accountant certify his trust account records.

[15 a, b] 106.20 Procedure—Pleadings—Notice of Charges

120 Procedure—Conduct of Trial

139 Procedure—Miscellaneous

230.00 State Bar Act—Section 6125

565 Aggravation—Uncharged Violations—Declined to Find

An attorney's unauthorized practice of law while on suspension is an appropriate matter to be considered in aggravation. Where, during the trial in a disciplinary matter, the respondent made a court appearance in a client's case while suspended for nonpayment of dues, the deputy trial counsel was not obligated to wait to file another disciplinary action to address the issue. Where respondent's counsel agreed that the deputy trial counsel could introduce evidence regarding respondent's court appearance during a later phase of the hearing, respondent received proper notice of the charge in aggravation.

[16] 230.00 State Bar Act—Section 6125

Where an attorney appeared in court on the date his suspension began solely to report to the court that his client was now without representation, and acted under the trial court's instructions to speak with the client about possibly resolving the lawsuit that day, and the trial was continued for the client to retain new counsel, there was not clear and convincing evidence that the attorney knowingly practiced law while suspended.

[17] 561 Aggravation—Uncharged Violations—Found

691 Aggravation—Other—Found

802.69 Standards—Appropriate Sanction—Generally

An attorney's admitted cocaine dependency is an appropriate factor to consider in determining the appropriate discipline for public protection.

[18] 130 Procedure—Procedure on Review

139 Procedure—Miscellaneous

1715 Probation Cases—Inactive Enrollment

Where respondent had been given notice that if his disciplinary probation were revoked he could be placed on inactive enrollment, and where the Office of Trials expressed grave concerns as to the threat posed by respondent to clients and the public, the Office of Trials could have sought to have respondent placed on inactive enrollment at the time the hearing judge revoked probation. Where it did not do so, respondent was allowed to continue to practice pending review of the hearing judge's order.

ADDITIONAL ANALYSIS

Culpability

Found

- 214.31 Section 6068(m)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 273.01 Rule 3-300 [former 5-101]
- 273.31 Rule 3-310 [former 4-101 & 5-102]

- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 291.01 Rule 4-210[former 5-104]
- 420.11 Misappropriation—Deliberate Theft/Dishonesty
- 1751 Probation Cases—Probation Revoked

Not Found

- 214.35 Section 6068(m)
- 221.50 Section 6106
- 230.05 Section 6125
- 253.05 Rule 1-400(C) [former 2-101(B)]
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Mitigation

Found but Discounted

- 725.36 Disability/Illness
- 750.32 Rehabilitation

Standards

- 831.40 Moral Turpitude—Disbarment
- 831.50 Moral Turpitude—Disbarment

Discipline

- 1010 Disbarment
- 1810 Disbarment

Other

- 173 Discipline—Ethics Exam/Ethics School
- 196 ABA Model Code/Rules
- 214.10 State Bar Act—Section 6068(k)
- 220.00 State Bar Act—Section 6103, clause 1

OPINION

PEARLMAN, P.J.:

This case comes before the review department on cross requests for review from a decision of a judge pro tempore of the hearing department finding respondent, Robert Michael Sklar ("respondent") culpable of charges in six original counts of misconduct. The misconduct involved misappropriation of client trust funds in three personal injury cases; failure to return files in three cases; failure to advise clients of potential conflicts of interest in three cases;¹ an improper loan of \$10,000 to a client; failure to perform in one case and failure to communicate in another. Respondent was also found culpable of violating the terms of probation imposed as part of prior discipline. His misconduct, which spanned most of his years of practice since he was admitted in 1981, was found to be aggravated by bad faith and dishonesty and to have caused substantial harm to clients, the public, and the administration of justice.

In the proceeding below, respondent also admitted that he suffered from cocaine addiction for which he was under a court-ordered treatment program commencing in May of 1992. The hearing judge found no mitigating circumstances, noted the potential applicability of disbarment for the misconduct found, but recommended four years stayed suspension on conditions, including actual suspension for two years and until respondent makes a showing of rehabilitation, learning and ability, and fitness to practice law under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct ("the standards"). (Trans. Rules Proc. of State Bar, div. V.) In making his recommendation, the judge indicated that he would strongly recommend disbarment if any further proceedings were initiated against respondent for any new matter or violation of any probationary condition.

The State Bar Office of Trials seeks disbarment on this record, pointing out in its brief on review, among other things, that the misappropriation involved over \$13,800 and that respondent's prior record of discipline should have been given greater weight.

Respondent's counsel admits respondent's culpability of misappropriation, but contends that it was negligent rather than intentional and stemmed from poor office management, since remedied. He also argues that respondent was not culpable of any of the three counts charging violation of former rule 5-102(B)² on the ground that the rule did not cover potential conflicts of interest, but only actual conflicts of interest which never occurred. He also challenges respondent's culpability with respect to the \$10,000 "advance" to respondent's client to pay for funeral expenses of her daughter. He further contends that mitigating evidence should have been considered and that the prior discipline should not be considered a true "prior" since the misconduct occurred during the same period of time as the current charges and could have been brought in one proceeding. Respondent's counsel urges us to determine that the appropriate discipline should include only one year of actual suspension.

Upon our independent review, giving great weight to the credibility determinations of the hearing judge, we adopt almost all of the findings below as augmented by additional findings supported by the record. While we conclude that respondent was properly found culpable of not obtaining written consent to represent joint clients in three cases and of failure to obtain a written promise of repayment of the \$10,000 loan, these violations were of relatively minor consequence under the circumstances. They are not the focus of our concern. Respondent cannot escape the serious consequences that stem from the finding that he misappropriated over \$13,800; that his conduct was dishonest; that it occurred over several years; that he thereby caused substantial

1. Following oral argument, we deferred submission of this case on our own motion pending receipt of post-argument briefs in another proceeding argued on the same date in which the interpretation of former rule 5-102(B) of the Rules of Professional Conduct (in effect through May 26, 1989) was also before this court. (*In the Matter of Twitty*, case number 90-O-15541 and consolidated cases.) This matter was there-

after deemed resubmitted on October 18, 1993, the date the last brief was received by the court in *In the Matter of Twitty*.

2. Hereafter, unless otherwise noted, all references to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

client harm; and that he was found not to be credible by the judge below.

The prior disciplinary proceeding against respondent also involved a finding that he misappropriated close to \$5,000 for his own use. This misappropriation was also found not to be the result of mere negligence. In addition, he also was found in that proceeding to have failed to perform and failed to turn files over to new counsel. Whether we consider the previously found misconduct a true "prior" as urged by the Office of Trials or whether, as urged by respondent's counsel, we treat the "prior" as part of a continuing course of misconduct, the result is the same. Respondent misappropriated nearly \$19,000 for his own use over several years' time. Restitution was found to have not been completed until 1992, long after he was reported to the State Bar. He has an ongoing substance abuse problem and failed to comply with the terms of his probation. Both case law and the standards clearly justify disbarment on the facts found here and we so recommend to the Supreme Court.

THE FINDINGS BELOW

This case involved three consolidated proceedings. In case number 87-O-13044, respondent was

charged with nine counts of original misconduct commencing in 1984, six counts stemming from his personal injury practice and three from his immigration law practice. The second proceeding was case number 91-C-03507, which the hearing judge abated at the unopposed request of the deputy trial counsel.³ [1a, 1b, 2, 3 - see fn. 3] The third proceeding was case number 91-P-07863, which arose out of respondent's alleged violation of the terms of his probation imposed as part of the discipline ordered by the Supreme Court in 1991 in State Bar Court case number 86-O-13652. (*In the Matter of Sklar* (S020779), order filed July 10, 1991.) The following facts are derived principally from the decision below as augmented by the parties' stipulation of facts.

Count 1

This count charged respondent with violations of Business and Professions Code sections 6068 (m) and 6106⁴ and former rule 6-101(A)(2). Respondent was employed to secure a labor certification and eventual permanent residence status for a client. The initial application was rejected because the client's American employer did not properly document the lack of available applicants for the position in the existing labor force. After a six-month waiting pe-

3. The decision indicates that the abatement was predicated on the deputy trial counsel's assertion that the referral from the review department was premature because no conviction had allegedly been entered after respondent had pled no contest to a misdemeanor violation of Penal Code section 417, subdivision (a)(1). Her earlier pretrial statement referred to respondent's conviction but noted that it had not yet become final. [1a] Finality of the conviction is not essential for a referral order. (*In re Strick* (1983) 34 Cal.3d 891, 898.) [2] In her motion papers to the court below, the deputy trial counsel also noted the possibility that the criminal proceedings would ultimately be dismissed if respondent complied with the terms of his probation. This possibility has long been held irrelevant to the effect of the conviction in State Bar proceedings. (Cf. *In re Phillips* (1941) 17 Cal.2d 55, 59.)

[3] The Office of the Chief Trial Counsel, in its "Transmittal of Records of Conviction of Attorney" dated November 13, 1991, listed the date of Sklar's conviction as September 25, 1991, the date his plea of nolo contendere was accepted and entered by the convicting court. Subdivision (e) of Business and Professions Code section 6101 provides in pertinent part that a conviction after a plea of nolo contendere is a conviction no less than a conviction after a plea or verdict of guilty. (See *In re Dedman* (1976) 17 Cal.3d 229, 231 ["... plea of nolo contendere . . . constitutes 'conclusive evidence of guilt'"; *In*

re Gross (1983) 33 Cal.3d 561, 564, 567 [attorney conviction based on plea of nolo contendere].)

[1b] Prior to 1991, the Supreme Court routinely referred nonfinal misdemeanor convictions to the Hearing Department of the State Bar Court for determination of whether there was probable cause to conclude that the circumstances involved moral turpitude, in order to determine whether the member should be intermily suspended pending the finality of the conviction. (*In re Strick, supra*, 34 Cal.3d at p. 898.) Effective December 10, 1990, the Supreme Court authorized the State Bar Court to exercise statutory powers pursuant to Business and Professions Code sections 6101 and 6102 with respect to the discipline of attorneys convicted of crimes. (See rule 951(a), Cal. Rules of Court.) The hearing judge was thereby empowered, even though the conviction was not final, to determine the issue of whether there was probable cause to conclude that the circumstances of respondent's crime involved moral turpitude for purposes of interim suspension. However, since he did not do so and no issue is raised concerning the abatement we do not reach the question whether it was an abuse of discretion to abate the proceeding.

4. Hereafter, unless otherwise noted, all references to sections of statutes are to sections of the Business and Professions Code.

riod, the application was resubmitted and ultimately approved. The hearing judge found that the employer's failure to comply with the government's recordkeeping requirements was not attributable to respondent as a failure to provide competent legal services under former rule 6-101(A)(2). He also found respondent adequately communicated significant events to his clients as required by section 6068 (m) and found no basis for the charged violation of section 6106. Accordingly, this count was dismissed; the State Bar does not challenge this result.

Count 2

At the hearing, the deputy trial counsel moved for dismissal of this count which charged respondent with identical violations to those charged in count 1 but involved a different client. It was dismissed without submission of any evidence.

Count 3

This count charged respondent with violating former rule 2-101(B)⁵ when he requested permission to address the employees of a factory and later spoke to them in October 1987. The owner had first checked with his employees to determine if they were interested in hearing respondent's presentation regarding changes in United States immigration law and attendance was voluntary. The hearing judge concluded that this presentation was purely informational and within the permitted ethical bounds. The State Bar does not challenge any of the findings or the resulting dismissal of this count.

Count 4

This count charged respondent with violation of former rules 2-111(A)(2), 5-102(B), 8-101(B)(3) and (B)(4) and section 6106. In May 1984, respondent was retained by the driver (Doreen Ross) and the passenger (Kay Lancaster) to represent both of them on a contingent fee basis to bring a personal injury case for injuries resulting from an automobile accident which they attributed to the negligence of the other driver. The hearing judge concluded that respondent violated former rule 5-102(B)⁶ when respondent did not disclose the potential conflict of interest in representing both the passenger and the driver in an automobile accident case and did not obtain their written consent to the joint representation.

Thereafter, respondent settled the case on behalf of Lancaster for \$15,000. The settlement draft dated February 28, 1985, was signed by both Lancaster and respondent and deposited in respondent's trust account on March 5, 1985. By March 22, 1985, respondent's trust account balance had fallen to \$82.11.

Answering Lancaster's request for funds, on April 18, 1985, respondent issued from his trust account two checks totaling \$4,000. One check for \$3,000 was returned for insufficient funds. On July 22, 1985, respondent issued Lancaster a new \$3,000 check which was honored.

Respondent contended that he and his staff intended to compromise the medical liens so that Lancaster could keep the \$4,000 he had distributed to her,⁷ but

5. Former rule 2-101(B) stated: "No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or 'communication' specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or 'communication' is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

"Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients."

6. Former rule 5-102(B) read as follows: "A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

7. Respondent's counsel asserts that the two checks written to the client during this period were not then due to Lancaster as her portion of the settlement since the medical and attorney's fee liens against the recovery then exceeded the total amount of the recovery. He does not suggest that the \$4,000 he paid her at that time might be construed as a voluntary reduction of his own fee although respondent testified that he eventually compromised his fee as well as the medical lienholders' claims in order to provide Lancaster with a right to receive the \$4,000 he had already distributed to her. However the payments to Lancaster are characterized, the fact remains that respondent misappropriated all but \$82.11 of the funds payable to health care providers on Lancaster's behalf.

encountered prolonged resistance from the medical providers. The medical lienholders' claims were eventually compromised and paid by respondent in late July of 1992 on the eve of the disciplinary hearing below. The hearing judge concluded that respondent had violated former rule 8-101(B)(3) by failure to render an appropriate accounting to Lancaster and former rule 8-101(B)(4) by failure to pay funds over on demand and section 6106⁸ [4 - see fn. 8] by his misappropriation of the funds subject to medical liens.

The evidence concerning Lancaster's requests for her files from respondent was inconclusive and the judge determined that insufficient proof was produced to establish by clear and convincing evidence a violation of former rule 2-111(A)(2).

Count 5

This count charged respondent with violations of former rules 2-111(A)(2), 5-101, 5-104(A) and 6-101(A)(2) and section 6068 (m). Priscilla Valencia testified through an interpreter at the hearing that she retained respondent on May 21, 1986, while she was still hospitalized and under sedation for injuries from an automobile accident which killed her daughter. Respondent indicated to the family that available insurance coverage might result in a settlement in the neighborhood of \$100,000. She and her family requested that respondent assist them by giving them \$10,000 to offset expenses related to the daughter's burial. No repayment terms were discussed and the

transaction was not otherwise memorialized. The check, which respondent characterized as a cost advance for litigation expenses, and the retainer agreement bear the same date. The hearing judge concluded that respondent agreed to pay personal expenses of his client in violation of former rule 5-104(A).⁹ He also found that respondent violated former rule 5-101 by failing to disclose fully in writing the terms and conditions of the transaction and to give the client the opportunity to seek independent advice concerning it.

Thereafter, under pressure from the family and admittedly without complete investigation into the case, respondent filed a lawsuit on Priscilla Valencia's behalf. It did not name the owner of the car as a defendant, nor did it include a wrongful death claim. Between May and December 1986, respondent met with Valencia at her home once and at his office, where he presented a proposed settlement which was rejected. The client's family contacted respondent's office regularly for progress reports from respondent's staff. Respondent was discharged by letter dated December 5, 1986, and the client requested the return of her file. Respondent neither answered the request nor returned the file until four months later. The hearing judge did not find a lack of communication in violation of section 6068 (m), nor a repeated failure to provide competent legal representation to the client in violation of rule 6-101(A)(2). He did find that a four-month delay in surrendering the client's file violated former rule 2-111(A)(2).

8. [4] In his discussion of each of the counts charging violations of section 6106, the hearing judge indicated that section 6106 did not proscribe conduct but simply stated the sanction for conduct involving moral turpitude, corruption, or dishonesty. We assume he reached this conclusion by analogy to similar language in section 6103. The Supreme Court has not similarly construed section 6106 but has repeatedly held that violation of section 6106 may be properly charged and proved. (See discussion in *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 349-350.)

9. Former rule 5-104(A) provided that "A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a

client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member: [¶] (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or [¶] (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or [¶] (3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client."

Count 6

This count charged violations of former rules 2-111(A)(2) and 5-102.¹⁰ [5a - see fn. 10] Respondent was retained in April 1986, by the driver (Marion Knight) and passenger (Alvin Horn, Jr.) in an automobile accident case. Respondent did not advise Horn of the possible conflict in joint representation and did not secure a waiver from him. Respondent contends that no actual conflict existed because the accident was caused by the negligence of the other driver.

Horn discharged respondent and obtained new counsel, who requested Horn's file from respondent on November 11, 1986. Respondent surrendered the file in April 1987, shortly before the expiration of the statute of limitations. The new counsel for Horn filed a complaint naming Knight as a defendant. The hearing judge concluded that respondent's failure to obtain a written waiver from his client to represent potential conflicting interests violated former rule 5-102. The hearing judge also concluded that respondent's conduct in delaying transfer of the file violated former rule 2-111(A)(2).

Count 7

This count charged respondent with violating former rules 5-102(B) and 8-101(B)(4) and section 6106 in a third automobile accident case. Respondent represented the Felixes, Ben Hur (brother/driver) and Benelyn (sister/passenger) in July 1984. As in the other matters, the potential conflict in representing both the driver and passenger in an automobile accident case was found not to have been discussed with the clients and respondent was found to have violated former rule 5-102(B).

Respondent received medical payments totaling \$8,072 from the first-party insurance company for his clients in advance of settlement, which were

subject to repayment to the insurance company upon settlement with the other driver's insurer. Respondent placed these funds in his trust account and later misappropriated most of them.

The matters were settled in December 1985. Respondent did not honor the subrogation rights of the insurance company nor did he advise the clients that a portion of their settlement had to be returned to the insurance company. Further, he computed his fee by including the advanced funds which the clients were required to refund. The clients were later sued by the insurance company and Ben Hur Felix had to borrow funds to repay the advance after unsuccessfully demanding a return from respondent of the excess fees he had taken out of the settlement. Respondent ultimately refunded the difference between the fee he had taken and the properly calculated amount (\$3,885.35) on August 3, 1990—three years after the client had demanded payment. The judge found a violation of former rule 8-101(B)(4) and section 6106.

Count 8

This count charged respondent with violating former rule 8-100(B)(4), current rule 4-100(B)(4)¹¹ and section 6106 by misappropriating funds set aside to pay a medical lien for Dr. Jai H. Lee out of a personal injury settlement for client Jin Young Park. The matter was settled in April 1986 and \$2,405 was withheld from Park's recovery to pay Dr. Lee's lien. The parties stipulated that respondent issued two checks on April 7, 1986, for \$2,405 payable to Dr. Lee but that the checks were never delivered. From April 1986 until January 1990, when Dr. Lee's bill was paid, respondent did not maintain sufficient funds in trust to pay the lien. Dr. Lee contacted respondent's office regularly about his lien, without response. The hearing judge concluded that this conduct violated former rule 8-101(B)(4), current rule 4-101(B)(4) and section 6106.

10. [5a] In count 6, unlike counts 4 and 7, the notice to show cause charged a violation of former rule 5-102 rather than specifying rule 5-102(B). Given the specificity of the factual allegations, this constituted adequate notice of the charged violation. (Cf. *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218,

1228, fn. 4; *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63; see also discussion, *post*.)

11. References hereafter to "current rule" are to the Rules of Professional Conduct which were in effect from May 27, 1989, to September 13, 1992.

Count 9

In this final count of the original proceeding, neither party disputes the hearing judge's findings and conclusions that respondent, as charged, violated former rules 2-111(A)(2) and 6-101(A)(2) as well as section 6068 (m). Respondent was retained by Ramona Johnson in August 1983 to set aside a real estate sale. Respondent filed a complaint on behalf of the client in October 1983, but little else was done on the matter. After four years, the client retained new counsel and she and the new attorney requested the file, both in writing and by telephone. Finally, the new attorney filed an ex parte motion seeking the tolling of the statute providing for dismissal of the action after five years for failure to prosecute to trial (Code Civ. Proc., §§ 583.310, 583.360) and for an order directing respondent to produce the Johnson file. Respondent did not surrender the file in response to the court order, although he promised counsel he would do so by express messenger service. Finally, the new counsel filed a motion before the superior court in San Diego seeking to have respondent held in contempt. Respondent showed up an hour and a half late to the contempt proceedings and only turned over the file after the judge advised him that he would be held in contempt if he did not do so immediately.

The Probation Revocation Proceeding

The notice to show cause in the probation revocation proceeding charged respondent with wilful violation of sections 6093 (b), 6068 (k) and 6103. Respondent had been the subject of a disciplinary order filed by the California Supreme Court on July 10, 1991, in State Bar Court case number 86-O-13652 (Supreme Court case number S020779) which included one year of stayed suspension and which placed him on probation for three years with conditions, including an actual

suspension for 80 days and passage of the multi-state professional responsibility examination ("PRE") within one year.¹² Among other conditions, respondent was to submit a quarterly report under penalty of perjury, attesting to his compliance with the State Bar Act and the Rules of Professional Conduct. If he handled any client trust funds during the quarter, he was to submit a certificate from a certified public accountant or public accountant ("CPA" or "PA") certifying to compliance with the specified trust account requirements. Respondent had met with his probation monitor before the first report was due to review all of the requirements, but had no further contact with the monitor until July 31, 1992, shortly before this disciplinary hearing began. Respondent conceded that he did not submit any quarterly reports when due on October 10, 1991, January 10, 1992, April 10, 1992, and July 10, 1992. All required reports which, except for their untimeliness, conformed to the probation conditions were finally filed on September 18, 1992, the last day of the hearing below.

Respondent's evidence on this issue concentrated on his efforts beginning in August 1991 to find a CPA to certify his trust account and the difficulties he encountered. The hearing judge found that respondent offered no explanation for the delay in filing quarterly reports without the certification or his failure to contact his monitor regarding the difficulties he was having in filing his reports. As a consequence, the hearing judge recommended revocation of respondent's probation for wilful violation of the terms and conditions of the Supreme Court order. He further recommended that respondent be given credit for the 80 days he had actually been suspended and that his suspension for violation of probation run concurrently with the actual suspension recommended in the consolidated original proceeding.

12. In 1991, the California State Bar developed its own examination for use in disciplinary cases—the California Professional Responsibility Examination ("CPRE"). The CPRE is specifically designed to test knowledge of the State Bar Act and California Rules of Professional Conduct as opposed to the

American Bar Association's Model Rules tested by the PRE. Passage of the CPRE is now routinely ordered instead of passage of the PRE in cases where an examination is deemed appropriate. (See *Layton v. State Bar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9.)

ISSUES ON REVIEW

Respondent's counsel raised the bulk of the substantive legal issues on review. They include: (1) whether respondent's failure to advise his clients and get written consent in three instances where he represented both the driver and passenger in automobile personal injury cases constituted misconduct within the ambit of former rule 5-102(B); (2) whether respondent's "advance" of \$10,000 to a client to pay the funeral expenses of his client's daughter constituted a violation of former rules 5-101 and 5-104(A); (3) what obligations respondent had, if any, under a subrogation policy to assure that the insurance company was reimbursed, under former rule 8-101(B)(4); and (4) whether respondent's misappropriation of funds through mismanagement of his trust account was appropriately characterized as negligent rather than intentional. Respondent's counsel also argues that in two instances where respondent failed to return files promptly to clients and their new attorneys, no harm resulted from the delay. The recommended discipline is excessive, in his view, given the remedial steps taken by respondent to avoid repeating his misconduct, including his reduction of the size of his staff and practice. He argues that a one-year actual suspension is appropriate, rather than the two years recommended by the hearing judge.

The Office of Trials filed for review primarily on the issue of the appropriate discipline. It did not raise any question regarding the findings in favor of respondent on all charges in the first three counts. However, with respect to counts 4, 7 and 8 it proposes additional findings of fact which derive primarily from the partial stipulation of facts filed by the parties during the trial below. We agree that the undisputed facts show that respondent misappropriated a total of at least \$13,807.34.¹³

The deputy trial counsel also argues that in analyzing the factors in aggravation, the hearing

judge made two errors. The first was his declination to consider respondent's prior disciplinary matter as aggravating because the misconduct in the prior matter and the present case occurred during the same period. The second alleged error was the hearing judge's failure to mention or weigh evidence submitted concerning respondent's unauthorized practice of law during the disciplinary hearing as a factor in aggravation.

Analysis of Potential Conflict of Interest
Under Former Rule 5-102(B)

First we address respondent's challenge to the finding that in three instances where both the driver and passenger in automobile accident cases sought representation by respondent (counts 4, 6 and 7), he violated former rule 5-102(B) by not advising them of the potential conflict of interest in the joint representation and failing to obtain their written consent to appear as counsel for both.

[5b] Preliminarily, respondent's counsel argues that under *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, he did not get sufficient notice of the charge. This argument is not well taken. In each count, the notice named the clients, identified the driver and passenger, stated that the respondent was employed to file a personal injury lawsuit on behalf of each and averred that respondent accepted the employment without advising either of the potential conflict of interest and obtaining their written consent to do so. At the end of counts 4 and 7, violation of former rule 5-102(B) is alleged; at the end of count 6, violation of former rule 5-102 is alleged. Since the notice specified the conduct at issue and the rule charged, the requirements of due process were met. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1153-1154; see also *Brockway v. State Bar, supra*, 53 Cal.3d at p. 63; *Ainsworth v. State Bar, supra*, 46 Cal.3d at p. 1228, fn. 4.)

13. As proved in count 4, the balance in respondent's trust account fell to \$82.11 eighteen days after he deposited the \$15,000 settlement draft and repeatedly for three months thereafter fell below the \$9,000 he should have been holding in his account to pay medical lien holders. This resulted in a misappropriation of \$8,917.89. As proved in count 7, over a

four and one-half month period respondent's trust account balance repeatedly fell below \$8,072, the amount he should have held in trust. Respondent misappropriated at least \$2,491.78 in this matter. As proved in count 8, respondent misappropriated \$2,397.67 out of \$2,405 which should have been held in trust between April 7, 1986, and January 19, 1990.

[6a, 7a] Respondent's primary contention is that the former rule does not encompass *potential* conflicts of interest. He relies on the lack of an express statement in the rule that the phrase "conflicting interests" encompasses potential as well as actual conflicts of interest. In contrast, the current version of this rule now sets forth expressly that it covers potential conflicts of interest. (See rule 3-310(C), Rules of Professional Conduct (as amended eff. Sept. 14, 1992).)¹⁴ In a disciplinary proceeding, a culpability determination must not be debatable. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 289; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 351.) As was noted in *In the Matter of Respondent K*, *supra*, few published California disciplinary opinions deal with violations of former rule 5-102(B) and its predecessor, rule 7. (*Id.* at p. 350.)

[6b, 7b] The issue before us is whether the existing case law in 1984 so construed former rule 5-102 as to make it clear that potential conflicts between clients required written consent for a single attorney to represent them in civil litigation. (Cf. *Gendron v. State Bar* (1983) 35 Cal.3d 409, 424 ["Existing case law as of 1976 clearly informed attorneys of their duty to refrain from representing multiple defendants in any criminal case where there was a possibility of conflicting defenses. (Citations.) It also taught that each client had a right to conflict-free advice on whether it was in his or her best interest to present such conflicting defenses. Absent such advice, no waiver of separate counsel could have been knowing and intelligent. (Citations.)"].)

We therefore look to the state of the law as of 1984 involving conflicts in civil proceedings, much as the Supreme Court has itself done in analyzing this area of professional responsibility. In *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, cited by the Office of Trials, the Court of Appeal for the Fifth Appellate District considered the issue of whether former rule 5-102 prohibited an attorney from repre-

senting both a wife and a husband in an uncontested dissolution proceeding and concluded that both actual and potential conflicts of interest were addressed by the rule. In cases of dual representation where there was the potential for conflict at any point in the litigation, the court found that "with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial. [Citations.]" (*Id.* at p. 899.) Indeed, the court stated that a purported consent in a contested proceeding to dual representation of litigants with actual present adverse interests would be per se inconsistent with the attorney's duty not to injure his client by advocating the interests of another client. (*Id.* at p. 898.)

More specifically on point is *Codiga v. State Bar* (1978) 20 Cal.3d 788, in which an attorney undertook representation of a woman and her husband to recover for the woman's personal injuries arising out of an automobile accident in which a newspaper was a defendant. The attorney had represented the newspaper in a number of matters and its stock was wholly owned by his in-laws. He was found culpable of misconduct by knowingly failing to disclose the conflict in violation of former rules 6 and 7. In 1975, former rules 6 and 7 were combined to comprise former rule 5-102. Former rule 5-102 additionally required the consent of the client to be in writing. (*Codiga v. State Bar*, *supra*, 20 Cal.3d at p. 792, fn. 2.) While *Codiga* involved fraudulent conduct, the Supreme Court in that case broadly stated that "An attorney representing clients with divergent interests in the same matter, must disclose to his clients all facts and circumstances which may aid them in making a free and intelligent choice of counsel." (*Id.* at p. 792, citing *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 590 and *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147.)

[6c] Because the duty to avoid conflicts under former rule 5-102(B) arises at the outset of the employment when there has been little if any oppor-

14. The December 1991 memorandum prepared by the State Bar Office of Professional Competence, Planning and Development which accompanied the request that the Supreme Court approve amendments to the Rules of Professional Conduct of the State Bar of California stated on page 16

thereof that no substantive change was intended by the inclusion of potential conflicts in rule 3-310(C) itself, noting that in the 1989 version of rule 3-310 the second paragraph of the discussion section made it clear that potential conflicts were covered.

tunity for investigation into the merits of the case, the intent of the rule is clearly prophylactic. Moreover, it is because of the lawyer's greater knowledge of their legal rights and remedies that the parties consult the lawyer in the first place. It is the lawyer's duty to secure as large a recovery as possible for the clients and to advise each client with undivided loyalty. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116-118.) The rule against representing conflicting interests is designed not only "to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]" (*Id.* at p. 116.)

The *Anderson* case involved an actual conflict of interest. In *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, the Court of Appeal distinguished between actual conflicts and potential conflicts. It defined an actual conflict of interest between jointly represented clients to occur "whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." (*Id.* at p. 713.) The Court of Appeal noted that the lack of an actual conflict of interest defeated the plaintiff's claim of actionable impropriety in the joint representation, but acknowledged that the potential conflict of interest described by plaintiff constituted a "[d]ivergence in interest requir[ing] counsel to disclose to each of his jointly represented clients whatever is necessary to enable each of them to make intelligent, informed decisions regarding the subject matter of their joint representation. [Citations.]" (*Ibid.*)

[6d] In the light of these authorities interpreting the attorney's ethical duties, we must therefore reject respondent's argument that he did not have to obtain the informed consent of his clients to their joint representation because he believed there to be no conflict of interest between them. Prior to 1973, the California guest statute (Veh. Code, § 17158) precluded social passengers involved in car accidents from suing the driver of the car in which the guests traveled. At that time, respondent's position that informed consent was not essential for the dual

representation of the driver and passenger against the other driver would appear to have had validity. However, that time is long gone. In 1973, the guest statute was declared unconstitutional (*Brown v. Merlo* (1973) 8 Cal.3d 855), and in the same year, California adopted the doctrine of comparative negligence. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1083, p. 482.) Thereafter, a potential conflict of interest existed between every driver and passenger. (See also *Cooper v. Bray* (1978) 21 Cal.3d 841 [striking down last remaining legislative bar against suits by certain passengers against the driver of the car in which they were riding].)

Respondent had not undertaken discovery at the time he undertook the joint representation and clearly had a duty to explore the issue of the driver's comparative negligence on behalf of the passenger client. That the facts as they developed in two of the cases appear to have supported respondent's view that no negligence claim against the driver was viable is relevant only to the seriousness of his violation of the rule requiring him to advise his clients of the potential conflict at the outset. In the third case, substitute counsel did in fact ultimately file a complaint on behalf of the passenger against the driver although the outcome was not made a part of this record.

[8a] By failing to disclose the potential conflict and to secure the clients' written consent to the joint representation, among other things, respondent exposed his clients to sharing confidences without realizing the potential impact of doing so; to possible delay due to disqualification of their lawyer if an actual conflict developed; and to reduction of the sources of recovery to the client passenger if any negligence of the client driver were established but never alleged. These were possible risks which the clients were clearly entitled to weigh before hiring a single joint attorney. Indeed, the concerns regarding potential conflicts in this setting are so strong that at least one state adopted a per se ban on joint representation of a driver and passenger in automobile negligence cases unless the driver and passenger were husband and wife or parent and child. (See *In the Matter of Petition for Review of Opinion 552 of the Advisory Committee on Professional Ethics* (1986) 102 N.J. 194, 206, fn. 3 [507 A.2d 233, 239, fn. 3].) In California, no such bar has been imposed and it is

by no means clear that respondent's clients would not have given their consent had he explained the lack of evidence of driver negligence and the risks and benefits of joint representation. However, no such opportunity was afforded them.

[8b] Culpability was properly found by the judge below on all three counts. Nonetheless, under the circumstances established in the record, we do not find these violations to be serious.

Culpability for \$10,000 Loan to Client in Count 5

[9a] Respondent challenged the culpability findings in count 5, charging him with violating former rules 5-101 and 5-104(A) in giving his client \$10,000 at the time he was retained to represent her in a personal injury action. At the hearing and on review, respondent maintained that this was a payment "advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests" under former rule 5-104(A)(3). Respondent does not quote the remainder of the rule, which limits such advances to "all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client." Respondent himself testified that this was not an advance of litigation costs, but of client expenses similar to medical expenses. The fact that the client's various expenses (which she did not limit solely to funeral costs in her testimony) might or might not be included in her lawsuit's prayer for relief as damages recoverable from the defendant do not make them a litigation expense.¹⁵ [9b - see fn. 15]

The hearing judge concluded that respondent violated the requirements of former rule 5-101 that the terms and conditions of the transaction be in writing and that the client be given a reasonable opportunity to seek the advice of independent counsel. The hearing judge further concluded that respondent paid personal expenses of the client in violation of former rule 5-104. Respondent denies

that the transaction was a loan to secure the client or that it constituted a business transaction with the client because "there was no profit or profit potential involved" and respondent did not acquire a pecuniary interest adverse to the client. Respondent does not deny that, although the terms for repayment were not established, he expected the moneys to be repaid and, in fact, respondent was ultimately reimbursed in July of 1992.

[9c] We agree that the transaction was an unsecured, no-interest loan, offered by respondent to pay, among other personal expenses, the funeral costs of the client's daughter. However, we agree with respondent's counsel that there was no basis for finding that respondent made the payment in order to obtain the client—the client testified that the loan occurred after respondent was hired—and we therefore delete the finding below that respondent paid the \$10,000 to secure the individual as a client. This does not affect the propriety of the finding, however, that respondent's payment was a loan for client expenses in violation of the requirements of both former rules 5-101 and 5-104 since former rule 5-104(A)(2) also required written consent of the client to the loan. We also conclude that there was no evidence of client harm and that the violation was not serious.

Violation of Rule 8-101(B)(4) in Count 7

[10] The hearing judge found that having received medical payments advanced by the client's first-party insurance company and having placed them in his trust account, respondent failed to apprise his client of the company's subrogation rights upon settlement with the other driver, and took excess fees in violation of former rule 8-101(B)(4). *In the Matter of Lazarus* (Review Dept. 1992) 1 Cal. State Bar Ct. Rptr. 387, 399, cited by respondent, is not on point. There we noted that the receipt of a draft made payable to the attorney and client under medical payment coverage of an insurance policy is not necessarily earmarked for medical payments only.

15. [9b] We note that a few jurisdictions allow lawyers to advance money to their clients for nonlitigation expenses. (See, e.g., Alabama DR 5-103(B); Minnesota Rule of Professional Conduct 1.8(e)(3).) However, this practice has not generally been accepted because financing by an attorney may

cause clients to choose attorneys on the basis of the loans they are willing to make rather than the services they offer and may also put the attorney in conflict with the client regarding settlement strategy. (See discussion in Rhode & Luban, *Legal Ethics* (1992) pp. 776-778.)

However, this does not affect the duty of the attorney to distribute all funds due at the time of settlement and to maintain funds in trust pending final settlement or other authorized distribution. *In the Matter of Lazarus* has no applicability to respondent's unexplained failure to reimburse the client for three years after demand was made by the client, subsequent to the erroneously calculated final distribution of settlement funds. By not paying back to the client the excess fees he admittedly received until three years after the client demanded such repayment, respondent clearly violated former rule 8-101(B)(4). As discussed below, we also adopt the finding of a violation of section 6106 based on respondent's misappropriation of the funds from his trust account.

Misappropriation of Client Funds

Respondent admits that he grossly neglected his client trust account, but contends that it was only through such gross neglect that he should have been found culpable of acts of moral turpitude under section 6106. [11a] Respondent obviously recognizes that the distinction between misappropriation arising from gross neglect and dishonest misappropriation can be very significant in determining the appropriate discipline. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367 ["not every misappropriation which is technically wilful is equally culpable"].) Nonetheless, the misappropriation found in respondent's prior disciplinary proceeding was determined to be due to misconduct more than mere neglect. The numerous dips in respondent's trust account occurred over such a long period of time (four years) that the hearing judge in that proceeding rejected respondent's explanation of negligence and concluded that respondent was repeatedly using the funds for his own purposes.

[11b] We see no reason to reject the hearing judge's similar conclusion in this proceeding that respondent's repeated acts of misappropriation were due to dishonesty rather than negligence. As respondent's counsel recognized at oral argument, once the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474.) The burden then shifts to the respondent to show that misappropriation

did not occur. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17.) The numerous instances in which funds were totally or nearly totally depleted from respondent's trust account over several years, the delay in repayment until the client was sued or until after the State Bar was contacted and the lack of credibility of his explanation support the hearing judge's conclusion that respondent dishonestly used the money for his own purposes.

Mitigation and Aggravation

The hearing judge, for purposes of determining discipline, did not identify respondent's prior discipline as an aggravating factor. In case number 86-O-13652, respondent was charged with twelve matters, found culpable on five charges (counts 1, 5, 7, 10 and 11) and the remaining charges were dismissed. Respondent was found culpable of violating former rule 2-111(A)(2) in four counts, an additional violation of former rule 6-101(A)(2) in one of the four counts and, in the most serious count, violation of former rules 8-101(A) and 8-101(B)(4) and section 6106 for misappropriation of nearly \$5,000 in trust account funds over a four-year period. Two significant factors were found in mitigation: his cooperation with the State Bar (std. 1.2(e)(v)) and remedial steps taken to insure against a repetition of the misconduct (std. 1.2(e)(viii)). No request for review was filed from that decision. In July of 1991, the Supreme Court ordered respondent suspended for one year, stayed, on conditions including 80 days actual suspension. (*In the Matter of Sklar* (S020779), order filed July 10, 1991.)

[12a] Respondent's counsel argues that it was proper not to consider the prior misconduct aggravating since the conduct, aside from the probation violation, took place during the same time period as the current misconduct, prior to disciplinary charges being filed in either case. We cannot agree. Prior discipline is a proper factor in aggravation "[w]henver discipline is imposed." (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 715; see *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) [13a] Given respondent's prior discipline for misappropriation, respondent would clearly be eligible for disbarment based on the cur-

rent record of misappropriation. (Cf. *Grim v. State Bar* (1991) 53 Cal.3d 21, 32, 36.) [12b] Nonetheless, the aggravating force of prior discipline is generally diminished if the misconduct underlying it occurred during the same time period. (*In the Matter of Hagen, supra*, 2 Cal. State Bar Ct. Rptr. at p. 171; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Since part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms (see *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646), it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in the prior case.

[12c] We therefore consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct in this period been brought as one case. [13b] The misconduct found in both cases combined involved multiple acts—ten client matters—and spanned from 1984 through 1992—all but three years of respondent's practice. It caused harm to numerous clients and jeopardized the rights of others. We also note that in the first disciplinary proceeding, the hearing judge found the respondent to be cooperative with the State Bar and to have taken remedial action regarding his trust account to avoid repetition of his misconduct. The judge in the second proceeding found respondent's prior remedial efforts much less credible,¹⁶ and had the additional knowledge that respondent had been using cocaine since the mid-1980's and by January of 1990 considered himself to be addicted. His substance abuse resulted in his hospitalization in 1991, continued into 1992 and was the subject of court-ordered treatment in May of 1992. This serious ongoing substance abuse problem had apparently not been acknowledged by respondent in the prior proceeding and was

not addressed in the prior discipline. Finally, the hearing judge below had the knowledge that respondent did not comply with the terms of probation of his prior discipline.

[14] As mitigating factors, respondent urged that his partial voluntary restitution and efforts at obtaining a CPA in order to file his quarterly reports should be accorded some weight. We disagree. Respondent misappropriated funds for up to six years from several different client settlement payments placed in his trust account. He owed the same fiduciary duty with respect to funds held in trust for medical lienholders as to his clients. (*In the Matter of Mapps* (Review Dept. 1990) 1 State Bar Ct. Rptr. 1, 10.) Nonetheless, the last liens were not satisfied until the eve of the hearing below, long after respondent had been reported to the State Bar. Respondent was obligated under the Supreme Court's disciplinary order to submit quarterly reports starting in 1991, including having a CPA or a PA certify his trust account records if respondent were to handle client funds during the subsequent probationary period. Since respondent not only failed to meet the terms of the Supreme Court order but failed to notify his monitor of his difficulty in complying, credit for his unsuccessful efforts in this regard is not appropriate.

As to aggravating evidence, the deputy trial counsel raises an additional issue regarding a charge she brought up at the hearing which was not addressed by the hearing judge in his decision. Effective August 10, 1992, respondent was placed on administrative suspension from practice by Supreme Court order for his failure to pay \$7,834 in costs ordered in connection with his prior disciplinary case and added by statute (§ 6140.7) to his State Bar member fees.¹⁷ (S027727, order filed July 17, 1992.) August 10 was also the fifth day of trial of respondent's disciplinary hearing. Respondent's counsel reported to the hearing judge and the deputy trial counsel on August 10

16. It is readily apparent that respondent's remedial measures were insufficient at the time he testified thereto in the first proceeding. In the proceeding below, respondent testified that it was not until December of 1991—a year and a half after he testified in the first proceeding—that he discovered that a key longtime employee had misappropriated \$70,000 from respondent's law practice over the past several years.

17. Respondent was suspended for less than two weeks—from August 10 through August 21 when the record below reflects that he brought his bar dues (including the costs added thereto) current by certified check. He had in 1985 also been briefly suspended for failure to pay bar dues and was suspended for 80 days in 1991 as part of his prior discipline.

that respondent was unavailable because of an emergency appearance he had to make in superior court in Los Angeles on what was to be the first day of trial in a case in which respondent was in the process of substituting out as counsel for the plaintiff. Respondent appeared therein solely for the purpose of informing the superior court judge that his client was now unrepresented and would need a continuance to obtain new counsel. Respondent had two months earlier arranged for substitute counsel to take over the case. However, after taking over depositions and other pretrial work, the substitute counsel had ultimately refused to sign the formal substitution of counsel leaving respondent as counsel of record.

[15a] At the disciplinary hearing on August 11, 1992, the deputy trial counsel indicated that if further proceedings were to be held to permit respondent to introduce additional evidence of rehabilitation, then she reserved the right to introduce at the same time additional evidence in aggravation, including evidence regarding respondent's court appearance. Respondent's counsel and the hearing judge agreed to that procedure as being fair.

At the hearing on September 18, 1992, the parties stipulated to the admission of the transcript of the superior court proceeding on August 10 and letters from the State Bar concerning respondent's outstanding costs and notice of his suspension. Respondent also testified concerning his appearance before the judge and his confusion as to whether his suspension commenced on August 10 or on August 11 and the fact that he told the judge he would be suspended by August 11.¹⁸

[15b] Respondent received proper notice of the charge in aggravation. The deputy trial counsel was clearly not obligated to wait to file another disciplinary action to address this issue; the unauthorized practice of law while on suspension is an appropriate factor to be considered in aggravation. (*In re Naney* (1990) 51 Cal.3d 186, 195.) [16] Here, however, there is no clear and convincing evidence that

respondent knowingly practiced law while suspended on August 10. Respondent testified that he went to court on August 10 solely to report to the court that his client was now without representation; that he did not engage in settlement discussions with the opposing counsel, but that the judge tried to resolve the case directly and respondent's only role was to follow the court's instructions to speak with his client about the possibility of resolving the case that day. The superior court judge noted on the record that in that proceeding the client was without counsel, and continued the trial for the purpose of permitting him to hire new counsel.

Finally, we consider that respondent also testified that he came to the realization in January 1990 that he had a problem with cocaine dependency. He further testified that he was hospitalized for that problem for three weeks in June of 1991, which did not result in his abstention from cocaine thereafter, and that because of the conviction matter which was abated by the hearing judge, he has been under court-ordered treatment for his addiction since May 15, 1992. In *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1126, the Supreme Court rejected evidence that Conway no longer suffered from cocaine addiction as "insufficient to overcome the strong showing that [he] posed a substantial threat of harm to his clients and the public" in light of his "past lapses and history of recurring wrongs." Here respondent admitted that despite the absolute ban on cocaine use which the program he is now enrolled in requires, he has used cocaine on at least one occasion since starting the program in May of 1992 although not in the three months prior to the hearing below. [17] Respondent's cocaine dependency is appropriate for us to consider in determining the appropriate discipline for public protection. (Cf. *In re Kelley* (1990) 52 Cal.3d 487, 498.)

RECOMMENDED DISCIPLINE

The hearing judge, in weighing his recommended discipline, was particularly disturbed that

18. The Supreme Court order specified that the suspension took effect "from and after August 10." (S027727, order filed July 17, 1992.)

respondent's misconduct in both original proceedings began so soon after his admission to practice, that he failed to meet the probation terms of his prior discipline and that he made no attempt to file any timely report with an explanation to the probation department or his probation monitor concerning the problems he was having securing the services of a CPA.

[13c] We agree with the hearing judge that standard 2.2 generally calls for disbarment for misappropriations of the type involved here and that standard 2.3 also would justify disbarment for acts of moral turpitude under the circumstances found here. Although not discussed in the decision below, the case law clearly supports disbarment as well. (See, e.g., *Grim v. State Bar*, *supra*, 53 Cal.3d 21; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128.) The amount misappropriated was clearly not insignificant, nor were there any mitigating circumstances found. Respondent's violation of probation and admitted cocaine addiction following imposition of discipline for years of professional misconduct underscore the danger to the public that he poses. The hearing judge noted that respondent has taken the initial steps in getting his personal life in order but did not explain how lengthy suspension was justified rather than disbarment which would also include the requirement of a reinstatement proceeding in order for respondent to seek to practice law in the future. We find no basis for the suspension recommendation.

Respondent has engaged in numerous breaches of professional ethics, which in the aggregate clearly require imposition of the harshest discipline as urged by the Office of Trials.¹⁹ [18-see fn. 19] Respondent's counsel argues that *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708 is authority for imposition of only one year of actual suspension. This argument is misplaced. Robins's mishandling of his cases was found to be due to gross negligence. No dishonesty was found. Moreover, there was extensive mitigating evidence in terms of Robins's religious conversion, pro bono activities and character witness testimony all of which are totally lacking here.

For the reasons stated above, we recommend that respondent Robert Michael Sklar be disbarred and that his name be stricken from the roll of attorneys in this state; and that he be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively after the effective date of the Supreme Court's order. We further recommend that costs of this proceeding be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

19. [18] It is puzzling to us under these circumstances that the Office of Trials did not seek to have respondent placed on inactive enrollment under section 6007 (d) at the time the hearing judge issued his order revoking respondent's probation. Respondent was given proper notice in the notice to show cause issued in the probation revocation proceeding that inactive enrollment under section 6007 (d) was one of the remedies sought by the State Bar for his alleged violation of

probation, but the Office of Trials did not mention this remedy in its pretrial statement. Nor did that office apparently raise the issue at the trial or in its brief to this court. As a consequence, respondent has been allowed to practice law for the last year pending this appeal (taking in approximately 10 new cases per month, by his testimony) despite grave concerns expressed by the Office of Trials as to the threat he poses to clients and the public.